IN THE MATTER OF the Ontario Human Rights Code, R.S.O. 1990, Chap. H-19;

AND IN THE MATTER OF the Complaint dated July 24, 1986, made by Sylvie Rodley alleging discrimination in employment on the basis of sex by Jim Barclay and Federated Building Maintenance Company Limited

Hearing Dates: November 23 - 25, 1992

Written Submissions: January 15, 1993

Date of Decision: January 22, 1993

Before: Maryka Omatsu, Chair Board of Inquiry

Appearances by: . Kaye Joachim, counsel for the Ontario Human Rights Commission

. Terry Kavanagh, for the Respondents, Federated Building Maintenance Company Limited and Jim Barclay

1. SUMMARY

This Board of Inquiry (Board) finds that the Complainant, Sylvie Rodley's rights under sections 4(1) [now 5(1)] and section 8 [now 9] of the Ontario Human Rights Code (Code) were infringed by Jim Barclay, a Respondent and employee of Federated Building Maintenance.

On the facts, the Board finds that the Complainant's sex was a factor in Jim Barclay's repeated decision not to appoint the Complainant to the part and full-time day cleaners job. This was contrary to sections 5(1) and 9 of the Code. The Board further finds that Barclay's employer, Federated Building Maintenance Company Limited (FBM) is responsible for the discriminatory acts of its employee.

The Board orders the Respondents to pay to the Complainant $9,000.00 in special damages and $1,000.00 in general damages for the loss of the right to be free from discrimination. The terms of this Order to be complied with, within 6 months of the date of this Order.

2. INTRODUCTION

The complaint was filed on July 26, 1986 by Sylvie Rodley, a cleaner, regarding her manager, Jim Barclay's refusal to appoint her to the part and/or the full-time day cleaners job at the Copps Coliseum in Hamilton, (Exhibit 2) contrary to sections 5(1) and 9 of the Code. By letter of appointment dated, October 27, 1992, I was appointed by the Minister of Citizenship, Elaine Ziemba, to act

as a Board of Inquiry to hear and decide the above mentioned complaint pursuant to section 38(1) of the Code (Exhibit 1). The hearing was set for November 23 - 25, 1992 in Hamilton for the presentation of evidence and legal argument. Written submissions were requested by the Board and received on January 15, 1993 on the quantum of special damages.

3. PRELIMINARY MATTERS

i) Parties to the Proceeding

At the commencement of the hearing, counsel for the Ontario Human Rights Commission (Commission) advised the Board that the Commission was no longer proceeding against Glenn Mackay. As requested, Mr. Mackay's name was deleted from the list of respondents.

Commission counsel asked that the complaint be further amended to list the corporate Respondent as the "Federated Building Maintenance Company Limited" (FBM) and not Federated Building Maintenance. I allowed the amendment after determining that the requested change constituted a minor correction which involved no prejudice to the Respondents. The officers of the corporation had been aware of the complaint from the beginning, knew that the corporation was the entity against which the complaint had been brought and never advised the Commission of its complete legal name. In Ballantine v. Molly 'N' Me Tavern, Professor McCamus concluded that: "reference to a trade name should, as in the case in civil proceedings, be taken to be a sufficient reference to the

entity carrying on business under that name." (1982), 4 C.H.R.R. D/1191 at D/1198, (Ont. Bd. Inq.) [See also Middleton v. 491465 Ontario Ltd. et al. (1992) 15 C.H.R.R. D/317 at D/318, relied on.]

Throughout the hearing, the conduct of the Respondents' case was conducted by Terrance Kavanagh, the President of FBM. Jim Barclay, the Complainant's manager and the named personal Respondent, was called by Mr. Kavanagh as a witness. For ease of reference throughout this decision, I refer to Mr. Kavanagh as the "Respondents' representative".

ii) **Exclusion of Witnesses**

Commission counsel asked the Board to order that all witnesses be excluded until called upon to testify. The Respondents' representative concurred with this, with the exception that his sister, Laura Kavanagh be permitted to testify and remain throughout the hearing to assist him. Both requests were agreed to by the parties.

iii) **Prejudice due to Delay**

The Respondents' representative argued that more than six years had passed since the alleged incidents and the filing of the complaint. During this interval, almost every witness had left FBM's employ and several witnesses could not be located. FBM had twice moved its head office and during the process had lost its file concerning the matter; moreover the Respondents had not been

the cause of the delay. During the period, FBM's business had changed significantly. In November, 1986, FBM had 1600 employees (Exhibit 7); by December 1987, having lost its Montreal and Halifax operations, its staff was reduced to 303 in the Toronto area (Exhibit 11); and by 1991, FBM employed 336 workers in the Toronto area (Exhibit 9).

In support of its position, the Respondents' representative presented the Board with its chronology of events that indicated that the complaint was active from August 1986 until September 1987 and then dormant until March 1990. During this 2 - 1/2 year period, FBM had closed its Hamilton business, had concluded its cleaning contract with Copps Coliseum, had had unsuccessful settlement discussions with a Commission officer but had nonetheless assumed that the matter was over.

Commission counsel objected to the Respondents' representative's chronology and it was agreed that the parties would try and come to an agreement on the chronology. On the following day, Commission counsel filed a chronology of contacts between the Commission and Barclay and FBM throughout the period from 1986 up to the hearing of the complaint. [Exhibit 5(a) and 5(b)] There was no objection from the Respondents' representative as to the facts contained in the Commission's chronology.

On the issue of delay, Commission counsel made reference to two boards of inquiry decisions that suggest two grounds for dismissal because of delay: i) if delay has made it impossible for the inquiry to proceed; and ii) if delay has so prejudiced a party

in its ability to present evidence such that to continue would constitute an abuse of process. [Lutz & Cosgrove v. Gray's Lakehouse Restaurant et al. (1991), 13 C.H.R.R. D/158 and Munsch v. York Condominium Corporation No. 60 (unreported Ont. Bd. of Inq. decision July 2, 1992) relying on Hyman v. Southam Murray Printing (1981), 3 C.H.R.R. D/617]

I advised the parties that not having heard any of the evidence, it was premature for me to make a decision on the question of delay. However, if during the course of the hearing, it became apparent that the prejudice to the Respondents was such that proper answer was impossible, the matter could be raised again.

At the conclusion of the hearing, the issue of delay was revisited by both Parties in their submissions to me. Commission counsel pointed out that the Board had heard the evidence of the key witnesses and that "mere inconvenience" and "fading memories" were not sufficient grounds to determine that the holding of the hearing constituted an abuse of process. (Munsch v. York Condominium Corporation No. 60, supra, referred to) Commission counsel repeated that the Respondents had an obligation to preserve evidence and to keep in touch with their witnesses.

The Respondents' representative replied that the delay "impaired its ability to prepare its defence" and that it should not be penalized because of the delay caused by the Commission, by an award of damages that included interest.

After having completed two long days of the hearing of

evidence, I am unable to find that the delay, which is nonetheless of concern to this Board, made it impossible for this inquiry to take place. As well, the Respondents were unable to sufficiently demonstrate that their prejudice significantly outweighed the Complainant's prejudice, should her complaint be dismissed.

iv) **Witnesses**

The Respondents' representative mentioned that there were some witnesses referred to in the Commission's case summary that he wanted to call but was unable to locate. The Board asked Commission counsel to assist the Respondents' representative in locating these witnesses.

During the proceedings Commission counsel advised that one potential Respondent witness, Ralph Sketchly, a Commission officer who was briefly involved with the investigation in July 1988, now lived in British Columbia. In response to a request from the Respondents' representative, she provided him with statements of a security guard and Walter Colling, a day cleaner. Commission counsel stated that the Respondents had had ample opportunity to try and locate their witnesses and had to bear some of the responsibility of keeping track of those witnesses whose evidence they felt would be helpful to their case.

Commission counsel advised the Board that it was prepared to waive its right of privilege and wished to call Susan Jostman, a Commission employee about prior statements made by Jim Barclay, a Respondent, and John Aikman, a former general manager of FBM,

before they gave evidence.

The Board advised Commission counsel that it was not prepared to allow Commission staff to give evidence about matters that might have been said by the Respondents in a privileged context. Boards of inquiry have been hesitant to have Commission staff testify or have their notes entered into evidence. On this point, I refer to Professor Zeman's decision in Salamon v. Searchers Paralegal Services (1987), 8 C.H.R.R. D/4162 at p. D/4164):

> "It is worth noting, however that much or all of the information gained by Commisssion officers at the inquiry and conciliation stages of human rights proceedings is privileged. In Benet v. Merer et al., (unreported Ont. Bd. Inq. decision of May 2, 1981) Professor Cumming sitting as a Board of Inquiry states at p. 9 that: 'the testimony of the [Commission] officers as to the inquiry and conciliation stage, are privileged on one or more grounds.' "

Commission counsel was asked to prepare legal submissions on the point, if she still wished to call the witness. The following day, Commission counsel referred to an interim decision of Adjudicator Gunther Plaut in the Jan Waterman v. North American Insurance Co. Ltd. (Oct. 9, 1992, unreported Ont. Bd. of Inq. decision) and to Salamon v. Searchers' Paralegal Services (supra). These cases dealt with the reluctance felt by boards of inquiries to the calling of Commission staff and the production of Commission

documents. Commission counsel argued that although Commission files are privileged, that privilege may be waived by the Commission.

Commission counsel stated that she wished to call Ms. Jostman, about statements that the officer had obtained from Messrs. Barclay and Aikman in the event that they might deny having made them. Commission counsel argued that if Ms. Jostman testified first, the prior statements if admitted, could be employed to prove the truth of the contents of the statements and not just to impeach the witnesses' credibility. However, it was her submission that if her witness testified after the Respondents' witnesses, Ms. Jostman's evidence would only go to impeach their credibility. (Sopinka, J., et al, The Law of Evidence in Canada, pp. 838-873, referred to).

The Respondent replied that the statements had been taken six years ago, that Commission counsel should simply cross-examine his witnesses about their statements and that it was unfair that certain statements went in and others did not.

Upon questioning from the Chair, Commission Counsel agreed that the Board of Inquiry had the power to hear witnesses in any order and to weigh the evidence appropriately. (Statutory Powers Procedure Act R.S.O. 1980 c. 484 s. 15 referred to) I held that the prior statements should be put to Messrs. Barclay and Aikman and if they did not adopt them, then Commission counsel could call Ms. Jostman. At that time, I would determine what weight and relevance to give to the evidence. This became academic as both Messrs. Barclay and Aikman adopted the statements they had made in

1986 and it was unnecessary for Ms. Jostman to take the stand. (Exhibit 12, tabs 5 and 8)

4. THE EVIDENCE

i) **Commission's Witnesses**

The Complainant, a francophone, testified that she graduated from a commerical high school in Montreal in 1967. She relocated to Hamilton, twenty years ago. Presently, she is 39 years of age. Previous to being hired by FBM, the Complainant worked for one year for North York Cleaners. From 1982-1985, she worked as a cleaner for Sunshine Cleaners. During the fall of 1985, the Complainant cleaned the floors of the Hamilton bus terminal for FBM, on at least four occasions and in November 28th, 1985 she was hired by FBM to work on the Copps Coliseum contract on an as-needs basis. The Complainant does not have a driver's licence.

Initially the Complainant was paid $4.50 an hour as a light duty cleaner. On December 2, 1985, the Complainant was promoted by Mark Perras, head office general manager, to supervise the light duty cleaners and her wage was raised to $6.00 an hour. (Exhibit 3, tab 10)

Cleaners were divided into two categories: generally with women performing light duty work at $4.50 an hour and men doing heavy duty cleaning at $5.25 an hour. Light duty work involved cleaning the washrooms, washing windows and emptying ash trays and garbage bins. Heavy duty cleaners washed and waxed the cement floors, used some machinery, vacuumed the carpets and cleaned the

stands. There were supervisors of light and heavy duty workers. Cleaners were called in after an event to clean up the Coliseum. The work was sporadic and the hours varied from day to night depending on whether the game or show was an evening or day time event.

Sometime in December, 1985, the Respondent Jim Barclay was hired as manager of the Copps Coliseum. When he became ill over Christmas, the Complainant filled in for him as manager.

In addition to the events cleaning staff to which the Complainant belonged, FBM had a full-time day cleaner who generally worked five days a week and a part-time day cleaner who worked the weekends. These cleaners were required on a daily basis to tidy up the ticket and main offices, the entrance hall, empty the garbage, clean the basement floors and windows and occasionally strip and wax the floors. These permanent day time full- or part-time jobs meant steady work and a regular pay-check and the Complainant wanted one of these positions. It was the policy of FBM to promote the part-time day cleaner to the full-time position, whenever there was a vacancy.

On January 31, 1986, the full-time day cleaner, Lawrence Hudson left and Charles Leitch, the part-timer was promoted to the full-time position. Leitch had been hired in November, 1985, at the same time as the Complainant, and the Complainant did not dispute that Leitch "would have known the job." The Complainant asked the Respondent, Barclay if she could have the full-time position. She was denied this opportunity. It was the

Complainant's evidence that Barclay told her that the Copps Coliseum people would not want a woman in the job. Partly on the suggestion of the Complainant, Jim Metcalfe, the Complainant's brother-in-law was given the part-time day cleaner job.

Metcalfe stated that he had had previous cleaning experience, had been hired at the same time as the Complainant and was supervisor of the heavy-duty cleaners. In that position, Metcalfe earned $6 an hour. Metcalfe's testimony supported the statement he made on August 4, 1986 which was entered into evidence.

> "What it comes down to is Jim Barclay does not figure a woman can do a man's job. He told me on several occasions he didn't like having a woman as a supervisor as he didn't figure a woman could handle such a responsible position." (Exhibit 4)

In March 10, 1986, Charles Leitch quit and Jim Metcalfe was given the full-time day cleaners job. The Complainant checked with the Copps staff regarding their stipulation for a male day-cleaner and it was her evidence that this was not their requirement. She confronted Barclay and asked to be given the part-time position. According to the Complainant, Barclay refused again and said that he wasn't going to put a woman in as day cleaner. In fact, Barclay filled the part-time day cleaner's spot with Walter Colling, who had also started at the same time as the Complainant, but had had no supervisory experience with FBM. It was the evidence of Jim Metcalfe that Walter Colling didn't complete his work and that as between the Complainant and Walter Colling, the Complainant was a

more thorough cleaner.

The Complainant testified that she was "frustrated, emotionally hurt" and "upset" by Barclay's refusal to promote her, because she knew that she "could do the job". On several occasions she called Toronto to complain about Barclay. This was not appreciated by either Barclay or head office, who felt that the Complainant should go through proper channels.

In March, 1986, the Copps Coliseum cleaners prepared a list of some 20-25 issues and a meeting was called of the employees presided over by John Aikman, general manager from the Toronto head office. Deborah Metcalfe, a light duty cleaner and wife of Jim Metcalfe, testified that she asked why women couldn't do the heavy duty work. It was Deborah Metcalfe's evidence that Barclay's response to that question on two previous occasions had been that "it was a man's job". However during the meeting, when she posed the question to John Aikman, he replied "why not." Shortly thereafter, Deborah Metcalfe began work as a heavy duty cleaner.

On May 12, 1986, Jim Metcalfe left FBM and Walter Colling was promoted to the full-time day position. Again the Complainant asked to be given the part-time job and was turned down. On May 15, 1986, the Complainant completed a Human Rights Commission intake questionnaire. (Exhibit 3, tab 1)

On June 22, 1986 Barclay told the Complainant that as the hockey season was over, she would no longer be required to work as a supervisor. Relations between the two were sour. On July 11, 1986, the Complainant testified that Barclay went to her house and

warned her that if she "rocked the boat" and continued to "bother head office", she would be fired. On July 24, 1986 the Complainant filed this complaint with the Commission. During the summer the Complainant was called on occasion to work as a heavy duty cleaner at a reduced hourly wage of $4.75 an hour. She was never offered the supervisor's job again.

On September 3, 1986, Walter Colling, the day cleaner was made a supervisor, and on September 30, 1986, Wayne Llewelyn was named the second supervisor. On October 29, 1986, the Complainant became involved in a dispute with another cleaner and Barclay warned her that if she walked off the job, he would not take her back again. Nonetheless, the Complainant went home. The following day, she returned to the Copps Coliseum but her name was not on the list of employees and she was no longer allowed onto the property. The Complainant worked for FBM for almost one year, November 28, 1985 - November 7, 1986. Her earnings in 1986 totalled $4,784.60. During her 10 months of unemployment, the Complainant earned $2,506.54. On September 1, 1987, she began full-time employment with a Hamilton bakery.

ii) **The Respondents' Witnesses**

The Respondent's representative introduced evidence through his sister, Laura Kavanagh. Ms. Kavanagh testified that FBM was committed to employment equity, was a family-run business that had always had women in positions of responsibility and had received a Certificate of Compliance from the Federal Contractors Program

(pursuant to the federal "Employment Equity Act") on October 25, 1991. (Exhibit 10) Ms. Kavanagh cited various locations in Toronto where the on-site managers, day persons and supervisors were women. She stated that gender was not an issue, that FBM was interested in "selecting the best person for the job", someone who could "represent the company and keep its customers and staff happy." She said that head office was not accustomed to receiving calls from supervisors at its site locations and that employees are advised to speak with their direct supervisors and managers. Ms. Kavanagh stated that FBM had always had a majority of female employees. Upon being cross-examined on this point by Commission counsel, Ms. Kavanagh replied that she did not believe that women were segregated into certain kinds of work and had never heard of the term, "occupational segregation".

Jim Barclay, the named Respondent and direct supervisor of the Complainant, had a grade 10 education. Barclay testified that he began his first job in a chicken factory at the age of 17. He began working for FBM at the Copps Coliseum, in November 1985, at the same time as the Complainant. Barclay's evidence was that he did not give the Complainant the day cleaner jobs because: she did not have a driver's licence and he believed that to drive the ride-on cleaning machine, a licence was necessary; that he required someone who was dependable, flexible and diplomatic and he did not believe that the Complainant was such a person; that the day cleaner was FBM's contact with the client (Copps Coliseum personnel) and as such the individual had to be able to communicate

and the Complainant had difficulty speaking in English. Barclay said he had a personality conflict with the Complainant who "acted like she wanted my job" and that he had overheard the Complainant say things to the other workers to "cut me down, to undermine my authority". He reiterated that he would make the same decision today because if the Complainant had the day job she "could jeopardize the contract and other people's jobs". In the end, Barclay said, the Complainant was "totally against me". He adopted his 1987 statement as recorded by Ms. Jostman, Commission officer. (Exhibit 12, tab 8)

John Aikman, general manager of FBM from 1985 to 1992, adopted the contents of his statement (Exhibit 12, tab 5). It was Aikman's evidence that he relied on the site manager to run his operation and to make all the hiring and promotion decisions. He said that it was unusual for employees to call head office and it was expected that staff would follow "the chain of command". He said that he supported Barclay's decision not to put the Complainant in the day cleaner job because Barclay was the direct manager, FBM was satisfied with Barclay as he was doing "everything that FBM and the Copps people wanted". He said that on the occasions that the Complainant called him it was to complain about Barclay. He said that it was "a war of wills" and that he got the impression that the Complainant "thought she should be manager".

Aikman attended the cleaners' meeting in March 1986, at the Copps Coliseum. At that meeting, Barclay and Aikman were presented with a list of demands. Aikman said the employees were divided

into two camps: the Complainant's camp versus FBM's people. Aikman stated that such a meeting had never been called before, and he took it "seriously."

Lastly the Respondent called Patricia Donikian who had not worked with the Complainant but who had been employed by FBM from 1988 to 1990 at the Copps coliseum. Initially, Ms. Donikian had been hired as a light duty cleaner, then promoted to supervisor and ultimately to site manager. It was her evidence that she was unaware of any examples of discrimination and did not believe that an employee's sex was considered a relevant factor by FBM in job selection or promotion.

It was the evidence of John Aikman that in 1986, cleaners were in short supply given the economic boom that Hamilton was undergoing at the time and the sporadic nature of the employment. Ms. Donikian added that given the labour shortage, many of the employees that she supervised were oftentimes substance abusers, unemployed and on welfare.

iii) **Discussion of the Evidence**

a) **Comments**

Much was made of two comments: 1) a statement attributed to the Complainant, in which she is said to have told Barclay on her last night as a FBM employee, "Get someone else to do your nigger work" and 2) a statement attributed to Barclay, to the effect that he thought a "woman's place was in the kitchen, barefoot and pregnant". I made no findings as to either statement having been

said by either party.

b) **Driver's Licence**

On August 27, 1986, the Complainant's notes indicated that Barclay called her at home and asked her if she had a driver's licence (Exhibit 3, tab 8) which she does not. In part, the Respondent relied on the Complainant's lack of a driver's licence to subsequently justify his refusal to try her in the day cleaner's job. Barclay and Aikman testified that the day cleaner had to be able to drive a ride-on cleaning machine. Although there is no legal requirement that a driver of such a machine be a holder of an Ontario driver's licence, it was the Respondent's position that it was a necessity for the day cleaner position. Jim Metcalfe testified that when he worked as a day cleaner, he was never called upon to drive this machine.

On the facts, I do not find that possession of a valid Ontario driver's licence is a bona fide occupational requirement for a day cleaner, such that no reasonable accommodation could not have been made to accommodate the Complainant's lack of such a licence.

c) **Witnesses**

I found credible the evidence of Debbie Metcalfe that Barclay refused on two occasions to move her into the heavy-duty cleaners group "because she was a woman". Similarly I accepted the evidence of Jim Metcalfe that Barclay had told him that there were men's and women's jobs and that one of the reasons why Barclay would not let

the Complainant work as a day cleaner was because he felt that "a man should be in the position to handle the day shift."

I found credible Laura Kavanagh's testimony that the corporate Respondent did not intentionally discriminate against the Complainant. Similarly I believed the uncontradicted evidence of John Aikman, that FBM did not have a policy against women being day cleaners.

5. LEGAL ARGUMENT

The complaint alleged discrimination on the following grounds:

a) contrary to section 5(1)

> "Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap."

b) contrary to section 9

> "No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part."

i) **Evidence of Mixed Motives**

It is now settled law that the Code is breached when it is proven that among the various reasons for a discriminatory act, one of the causes was a prohibited ground under the Code. In Maren Engell v. Mount Sinai Hospital et al. (1990) 11 C.H.R.R. D/68 at p. D/72, Professor Backhouse finds that the "entire decision was

tainted" if the Complainant's disability was a factor in the Respondent's decision to deny vacation leave. See R. v. Bushnell Communications Ltd. (1973), 45 D.L.R. (3d) 218; aff'd (1974), 47 D.L.R. (3d) 668 (CA) referred to in Engell (supra); Taylor v. Via Security Systems Inc. (1986), 8 C.H.R.R. D/3925, at p. D/3930; and Horton v. Niagara (Regional Municipality) (1987), 9 C.H.R.R. D/4611 at p.4615. And see Judith Keene, Human Rights in Ontario, 2nd ed., Toronto: Thompson Canada Ltd., 1992, p. 352 and cases cited.

ii) **Respondents' Liability**

a) **Jim Barclay**

Jim Barclay, the Hamilton site-manager of Federated Building Maintenance, was the individual who actually refused to hire Sylvie Rodley into the part- and full-time day cleaners positions at the Copps Coliseum. His decision to do so, if based on gender, comprises a direct infringement of the Complainant's rights not to be discriminated against because of her sex contrary to sections 5 and 9 of the Code. He may thus be found to be personally liable for the Code violation.

b) **The Corporation, Federated Building Mainentance**

A corporation is an entity separate and distinct from its shareholders and it is the corporation that owns and operates the business and incurs the liabilities. The corporate Respondent, FBM employed Jim Barclay as the Complainant's manager and was represented during the hearing by Terence Kavanagh, its president.

Respondent employers have been held liable for the discriminatory acts of their employees. On this point, Mr Justice La Forest speaking for the Supreme Court of Canada wrote:

> "(at p. 91) the central purpose of a human rights Act is remedial--to eradicate anti-social conditions, without regard to the motives or intention of those who cause them.... (at p. 95) (on S.41 of the Federal Human Rights Act, which is similar to S. 45(1) of the Code)...I would conclude that the statute contemplates the imposition of liability on employers for all acts of their employees 'in the course of employment', interpreted in the purposive fashion outlined earlier as being in some way related or associated with employment ...(continuing at p. 96) I should perhaps add that while the conduct of an employer is theoretically irrelevant to the imposition of liability in a case like this, it may nonethless have important practical implications for the employer. Its conduct may preclude or render redundant many of the contemplated remedies. For example, an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. These matters, however, go to remedial consequences, not liabililty." [Robichaud & C.H.R.R. v. Q. [1987] 2 S.C.R. 84 (S.C.C.)]

If it is found that during the course of his employment, Barclay violated the Code, FBM is vicariously liable for the acts of its employee. Section 45(1) of the Code stipulates that:

> "For the purposes of this Act, except ss. 2(2), ss. 5(2), s. 7 and ss. 44(1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization."

6. CONCLUSION

It was the Respondent's evidence (Aikman and Donikian) that in 1986 and 1987, it was difficult for the Respondent to find workers who were willing to accept the employment conditions of a cleaner. This was further corroborated by the evidence that every several months one of the day cleaner positions became vacant, as the employees moved onto other jobs. To have found a reliable employee to fill the opening would have been a good management decision.

It was clear from Barclay's testimony that the Complainant did not meet all his preferred criteria for the position. However, in December 1985, while Barclay was ill, the Complainant filled in for him as site manager, thus indicating the Complainant's "seniority" and FBM's confidence in her abilities. It was uncontradicted that

during the first several months of the Complainant's employ that Barclay thought very highly of her work as a cleaner and supervisor and that relations between them were excellent. However, upon the Complainant learning that Barclay's refusal to put her into the day cleaner position was due in part because of her gender, relations between them began to worsen. Much was made of the requirement that the day cleaner had to be a reliable "team player", which the Complainant stopped being once she was refused the day cleaners job. Based on the credible evidence of Jim and Deborah Metcalfe, which corroborated that of the Complainant's, I conclude that Barclay decided that because the Complainant was a woman, he did not think that she could do the day cleaners job or handle the pressures involved in supervising men.

At that time, the operation at Copps Coliseum was "de facto" segregated by gender into light duty cleaners (ie. women) and heavy duty cleaners (ie. men). This was further upheld in pay distinctions between the two categories. I accept FBM's evidence that its other operations were not run identically to that at the Copps Coliseum. However, at the Hamilton site, there was a general atmosphere of gender bias that permeated the employment conditions of the cleaners. FBM was obligated to ensure that its employees conducted themselves within the ambit of the Code. This they failed to do, even when it was brought to their attention by the Complainant and by the other cleaning staff at the March 1986 meeting held to air grievances.

I find that it has been established that one of the reasons

why Jim Barclay, the named Respondent did not move the Complainant into either the part-time or full-time day cleaners position was because she was a woman. Accordingly, I conclude that Jim Barclay discriminated against the Complainant on the basis of her sex, in the course of his employment as a site manager with FBM. Although no discriminatory intent against the corporate Respondent, FBM was alleged or proven, FBM is liable for the discriminatory acts of its employee. By March 1986, if not before, due in part to the Complainant's phone calls and the staff meeting, FBM was aware of employee disgruntlement, some of which was related to gender segregation in employment. However, FBM management in Toronto did not take appropriate steps to remedy the situation.

7. REMEDY

The remedial provisions of the Code applicable to the present case are set out in s. 41(1):

> "Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of s. 9 by a party to the proceeding, the board may, by order
>
> (a) direct the party to do anything that, in the opinion of the board, that party ought to do to achieve compliance with this Act, both in respect of the complainant and in respect of future practices; and
>
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement has

been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish."

i) **Special Damages**

Commission counsel made oral submissions that the Complainant should receive $26,352.82 in special damages that included lost earnings plus interest on those earnings. This was calculated on the following facts:

a) During 1986, the Complainant earned $4,784.60 from FBM.

b) She was unemployed for 10 months (November 7, 1986 - September 1, 1987.) During this period she earned $2,506.54 in part-time work.

c) If she had received the full time day cleaners job from January 1, 1986 until September 1, 1987 she would have earned $16,470.78.

d) Interest on lost earnings was calculated to be $9,882.04.

On the question of special damages, the Respondents' representative made the following submissions: The Complainant had walked off the job at FBM. The day cleaners job was not always full-time. For example, in the summer of 1986, it was 3 days a week and a full-time week was 40 hours and not 44 hours as suggested by the Commission. As regards interest, the Respondents' representative stated that as substantial delay had occurred, that it was unfair to penalize the Respondents for this and as interest

was not automatically awarded, he was prepared to leave this matter in the Board's hands. The Respondents' representative further added that the Complainant had not taken reasonable steps to mitigate her losses. He pointed to the fact that, in 10 months of being without a job and in a period of low unemployment, the Complainant had made only 4 formal job applications. He argued that the Complainant had "made no serious attempt to find a job."

The Respondents' representative did not make full oral submissions on remedy and contested some of the Commission's submissions. In particular there was contradicted or incomplete evidence on the following: the exact date in January 1986 that the Complainant could have assumed the part-time position; the exact date in March 1986 that she could have been put into the full-time cleaner's job; the hourly wage of day cleaners; the number of hours and days worked by day cleaners during the period from January 1986 until September 1, 1987. In the absence of uncontradicted evidence or adequate reply from the Respondent's representative, I had difficulty in calculating the quantum of special damages. Accordingly on December 31, 1992, I requested that parties and counsel make written submissions to me on those points by January 15, 1993. This they did.

Unfortunately, although the Respondents' representative was able to supply the Board with payroll data for 1986, it was unable to do so for 1987. Accordingly I am able to determine: that the earliest date that the Complainant could have assumed the part-time day cleaner job was on January 31, 1986; that March 10, 1986 was

the appropriate date for the assumption of the full-time position and that the Complainant lost $5,743.20 through not having been appointed to the day cleaner positions in 1986. As regards the number of hours worked by day cleaners, the Respondents' representative in his written submissions to me, calculated that averaged over a year and including both their supervisory and day cleaner hours, Metcalfe worked 32 and Colling 30 hours a week. Thus he argued that "it would be more appropriate to use approximately 20 to 25 hours" for the day cleaner hours. On the question of hourly wage, the Respondents' representative wrote that Leitch and Hudson made $5.00 per hour, Colling from $5.00 to $6.25 and Metcalfe from $5.00 to $6.30. As regards Colling and Metcalfe's higher salaries, he advised that they reflected their additional supervisory duties. In reviewing the wage rates the Respondents' representative submitted that the rate should be "$5.00 increasing to $5.25 in the last week of April, 1986." Based on the evidence before me, I am unable to determine with precision the exact amount that the Complainant might have earned in 1987 as a day cleaner. I have based my calculation on the best evidence presented to me.

ii) **General Damages**

Commission counsel submitted that the Respondent knew that his conduct was wrong. Based on Cameron v. Nel-Gor Castle Nursing Home (1984), 5 C.H.R.R. D/2170, Commission counsel argued that the Complainant should receive $3,000.00 in general damages for either

the Respondent's "wilful or reckless" actions or for the "loss arising out of the infringement."

The Respondent's representative denied that FBM had acted "wilfully and recklessly".

Commission Counsel replied that an award for general damages did not require evidence that the Respondent had acted wilfully and recklessly and that there was evidence from the Complainant that she was "upset" by Barclay's refusal to appoint her to the day cleaner job.

iii) **Discussion on Damages**

With respect to the claim for lost wages, I find that the law has established as a general principle that human rights remedies are intended to encompass full and complete compensation of the Complainant's losses. The purpose of the damage award is to put the Complainant, so far as money can do, in the position she would have been in had her rights not been violated. An award of damages under the Code must reflect the social importance of the rights that are being protected. However, a Complainant is under a duty to mitigate her damages, by making reasonable efforts to obtain other employment. [Piazza v. Airport Taxicab (Malton) (1989), 10 C.H.R.R. D/6347 (Ont. C.A.) and Torres v. Royalty Kitchenware Ltd. (1982), 3 C.H.R.R. D/858, relied on]

Given the uncontradicted evidence that in 1987, workers were

in high demand, I am disturbed by the Complainant's 10 months of unemployment and the fact that she made only four formal job applications during that period. As well, I am concerned about the time it has taken for this complaint to be heard. Accordingly I do not think that an award for interest is appropriate in this case.

As regards the Complainant's receipt of unemployment benefits during her period of unemployment, (Exhibit 3, tab 16) these benefits will not be deducted by this Board from the award of special damages. The Board agrees that the Respondent's appropriate course of action is to contact the Unemployment Insurance Office at Canada Employment and Immigration, to determine what amount should be deducted from this award (if different from Exhibit 3, tab 16) and remit those amounts directly to the government agency concerned. Middleton v. 491465 Ontario Ltd. et al. (supra) and Ratych v. Bloomer (1990), 69 D.L.R. (4th) 25 (S.C.C.)

8. ORDER

For the reasons given, it is hereby ordered that the Respondents, Jim Barclay and Federated Business Maintenance Company Limited, are found to be jointly and severally liable and required to make restitution to the Complainant in the amount of:

i) $9,000.00 in special damages for lost wages.

ii) $1,000.00 in general damages for the loss of the right to be free from discrimination.

iii) payment to be made by the Respondent(s) within 6 months of the date of this Order.

DATED at Toronto, this 22nd day of January, 1993.

MARYKA OMATSU

constituted as a Board of Inquiry